84-706

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NO. 84 -

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

THOMAS LARSON, Individually and as Secretary of the Pennsylvania Department of Transportation; JOHN HARHIGH, Individually and as Director of the Bureau of Human Resources; ROBERT ROWLAND, Individually and as District Engineer, Engineering District 6-0; SAMUEL ARRIGO, Individually and as Maintenance Manager, Maintenance District 6-1, Buck County; LOUIS O'BRIEN, Individually and as Director Bureau of Maintenance; JOSEPH WADE, Individually and as Assistant District Engineer; HONORABLE RICHARD THORNBURGH, Individually and as Governor of the Commonwealth of Pennsylvania

Petitioners

v.

FRANCIS W. FITZGERALD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Whether this Court should hold this case for disposition consistent with its decisions in two cases presently pending before it which raise the same issues raised in this case:

a. Whether the Court of Appeals erred in holding that Pennsylvania's six month statute of limitations for actions against public officials may not be borrowed for purposes of a federal civil rights action because the state statute of limitations is too short and, therefore, inherently conflicts with the policies underlying the civil rights statutes. Knoll v. Springfield Township School District, No. 83-1889.

b. In the alternative, whether the Court of Appeals erred in holding that a first amendment claim based upon alleged interference with one's freedom of political association and brought under the federal civil rights acts was not analogous to a claim of injury to the person and therefore barred by Pennsylvania's two year statute of limitation. Garcia v. Wilson, No. 83-2146.

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IN THE SUPREME COURT OF THE
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THOMAS LARSON, Individually and as Secretary of the Pennsylvania Department of Transportation; JOHN HARHIGH, Individually and as Director of the Bureau of Human Resources; ROBERT ROWLAND, Individually and as District Engineer, Engineering District 6-0; SAMUEL ARRIGO, Individually and as Maintenance Manager, Maintenance District 6-1, Buck County; LOUIS O'BRIEN, Individually and as Director Bureau of Maintenance; JOSEPH WADE, Individually and as Assistant District Engineer; HONORABLE RICHARD THORNBURGH, individually and as Governor of the Commonwealth of Pennsylvania

Petitioner

v.

FRANCIS W. FITZGERALD

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Attorney General of the Commonwealth of Pennsylvania, on behalf of petitioners THOMAS LARSON, et al., hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (1a-20a) is reported at 741 F.2d 32 (3d Cir. 1984). The order of the district court (39a), and the report of the magistrate (21a-38a) are not reported.

STATEMENT OF JURISDICTION

The Court of Appeals filed its opinion on August 20, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Civil Rights Act of 1871, as amended, 42 U.S.C. Section 1983, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable, in equity, or other proper proceeding for redress.

42 U.S.C. Section 1988, provides, in pertinent part, as follows:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and

punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Section 5522 (b)(1) of the Pennsylvania Judicial Code, 42 Pa. Cons. Stat § 5522 (b)(1), provides as follows:

(b) Commencement of Action Required - the following actions and proceedings must be commenced within six months:

(1) An action against any officer of any government unit for anything done in the execution of his office, except an action subject to another limitation specified in this subchapter.

Section 5524 (2) of the Pennsylvania Judicial Code, 42 Pa. Cons. Stat. § 5524 (2), provides as follows:

[t]he following actions and proceedings must be commenced within two years:

(2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

STATEMENT OF THE CASE

This is a civil rights action, brought under 42 U.S.C. §§ 1983, 1985, 1986 and 1988, by Francis Fitzgerald (Fitzgerald). Fitzgerald was employed by the Pennsylvania Department of Transportation (Department) in a nontenured position until his dismissal on June 7, 1979 (2a). On May 5, 1982, suit was filed against several Department officials (hereinafter "petitioners") in their official and individual capacities. Fitzgerald claimed that his termination from employment was unconstitutional because the sole reason for his dismissal was his affiliation with the Democratic Party (3a). Fitzgerald sought reinstatement, backpay, benefits, and attorney's fees and costs.

Petitioners moved to dismiss the action as barred by the applicable

statute of limitations. They contended that Pennsylvania's six-month statute of limitations, which governs actions against public officials[1], barred Fitzgerald's claim which was filed nearly three years after his termination from employment (3a).

While the case was still pending before the district court, the Court of Appeals for the Third Circuit filed its decision in Knoll v. Springfield Township School District, 699 F.2d 137 (3d Cir. 1982) (Knoll), in which it concluded, inter alia, that application of Pennsylvania's six-month limitation period to employment discrimination cases brought pursuant to 42 U.S.C. § 1983 was inherently inconsistent with the policies underlying the federal

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[1]42 Pa.Cons.Stat. § 5522(b).

civil rights acts.[2]

In response to Knoll, the petitioners filed a supplemental brief in the district court in which they contended that, if the six month period could not be applied to Fitzgerald's first amendment claim, Pennsylvania's two year statute of limitations, which governs, inter alia, actions for injury to the person, 42 Pa. Cons. Stat. § 5524(2), was the proper statute to be applied (3a).

---

[2]Having rejected the six month limitation, the Third Circuit applied a six-year limitation, 699 F.2d at 145. As will be addressed in further detail, infra at 16-17, this Court granted certiorari in Knoll on July 2, 1984 at No. 83-1889.

[3]The defendants in Knoll had not raised the two year statute of limitations because the complaint in that case was filed within two years of the date of the plaintiff's termination.

The United States District Court for the Middle District of Pennsylvania, adopting the report and recommendation of the United States magistrate (21a-38a), dismissed the complaint (39a). The magistrate concluded that Pennsylvania's two year statute of limitations was applicable because Fitzgerald's claim was "analogous to the intentional infliction of emotional distress," because Fitzgerald had "no contractually protected property or economic right" and because "the gravaman of [his] charge [was] the emotional distress which burden[ed his] right to exercise his political rights" (31a).

The Court of Appeals reversed, holding (1) that its earlier decision in Knoll precluded the use of the six month statute and (2) Fitzgerald's claim more closely resembled the tort of "wrongful discharge or interference with contractual or economic rights" and, therefore, fell within

Pennsylvania's six year residuary statute rather than the two year statute for injuries to the person (19a).

REASONS FOR GRANTING THE WRIT

1. The first question presented in this case is identical to that presented in Springfield Township School District, et al. v. Knoll, No. 83-1889, cert. granted, (July 2, 1984).

The first question presented in this case is identical to that presented in Knoll. Here, as in Knoll, the Third Circuit concluded that Pennsylvania's six month statute of limitations for actions against public officials may not be applied to federal civil rights actions brought under 42 U.S.C. § 1983 "because it is too short to serve the remedial purpose of the federal civil rights statutes" (8-10a).

For the same reasons expressed in the petition for writ of certiorari in Knoll, the petitioners here believe that Pennsylvania's six-month statute of limitations for actions against public officers is consistent with the

civil rights statutes and decisions of this Court. In Knoll, the reasons set forth by the petitioners for granting the writ were as follows:

> A. The decision of the Third Circuit in Knoll conflicts with the decisions of other courts of appeals as to whether six-month statutes of limitations may, consistent with federal policy, be applied to federal civil rights actions, and
>
> B. The Knoll decision conflicts with the decision of this Court in Board of Regents v. Tomanio, 446 U.S. 478 (1980), on a matter which involves an important question of federal law regarding application of state statutes of limitations to federal civil rights actions.

Accordingly, the Court's determination of the issues raised by the petitioners in Knoll will control the proper resolution of the first issue here.

2. The Second Question Presented in This Case Will be Controlled by this Court's Disposition of Wilson v. Garcia, No. 83-2146, cert. granted, (October 1, 1984)

Petitioners argued in the alternative below that Pennsylvania's two year statute of limitations, 42 Pa.Cons.Stat. § 5524(2), which governs, inter alia, "injuries to the person" was the appropriate statute to be borrowed (4a).

In Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984) (en banc) ("Garcia") the Court of Appeals for the Tenth Circuit concluded "that every section 1983 claim is in essence an action for injury to personal rights", and therefore "all section 1983 claims in [the Tenth] circuit will be uniformly so characterized for statute of limitations purposes." 731 F.2d at

651.[4] In deciding as it did, the Tenth Circuit rejected the approach followed by the Third Circuit here of analogizing the facts of each civil rights claim to factually similar state law claims. Id. at 648-649.

If this Court affirms the holding in Garcia that all civil rights claims are properly analogized to state personal injury claims, Pennsylvania's two year statute of limitations would then be applicable to Fitzgerald's claim, and his action barred. Accordingly, even if the Court's determination of the issues raised by the petitioners in Knoll does not require reversal of the Third Circuit's decision in this case, the Court's determination of the issues raised by

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[4]As noted above, on October 1, 1984, this Court granted certiorari in Garcia.

the petitioners in Garcia may. Therefore, we recommend that the present petition be held until the Court's determinations in Knoll and Garcia.

CONCLUSION

The petition for a writ of certiorari should be held and, thereafter, be disposed of as appropriate in light of the Court's decisions in Springfield Township School District v. Knoll, No. 82-1889 and Wilson v. Garcia, No. 83-2146. Specifically, if this Court reversed or vacates the lower court holding in Knoll, this case should be remanded for reconsideration in light of that holding. On the other hand, even if this Court affirms in Knoll, if it also affirms the Tenth Circuit in Garcia, this case should be remanded in light of that holding.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-3493

FRANCIS W. FITZGERALD,

Appellant

v.

THOMAS LARSON, Individually and as Secretary of the Pennsylvania Department of Transportation; JOHN HARHIGH, Individually and as Director of the Bureau of Human Resources; ROBERT ROWLAND, Individually and as District Engineer, Engineering District 6-0; SAMUEL ARRIGO, Individually and as Maintenance Manager, Maintenance District 6-1, Buck County; LOUIS O'BRIEN, Individually and as Director Bureau of Maintenance; JOSEPH WADE, Individually and as Assistant District Engineer; HONORABLE RICHARD THORNBURGH, Individually and as Governor of the Commonwealth of Pennsylvania

Appeal from the United States District Court for the Middle District of Pennsylvania (Scranton) (D.C. Civil No. 82-0762)

Argued May 25, 1984

Before: GARTH, SLOVITER, Circuit Judges, and FISHER, District Judge
(Opinion filed August 20, 1984)

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[1]Hon. Clarkson S. Fisher, Chief Judge, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

SLOVITER, Circuit Judge.

The issue for decision is which of Pennsylvania's statutes of limitations applies to plaintiff's claim that he was wrongfully discharged by his employers, Pennsylvania state officials, in violation of his First Amendment rights.

I.

Francis Fitzgerald was employed by the Pennsylvania Department of Transportation (PennDOT) in a non-tenured position until his dismissal on June 7, 1979. He brought this suit on May 5, 1982 against several PennDOT officials in their individual and official capacities, alleging violation of 42 U.S.C. §§ 1983, 1985, 1986, and 1988.[1] Fitzgerald asserts that the sole reason for his dismissal was his affiliation with the Democratic Party,

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[1]This action was commenced in the Commonwealth Court of Pennsylvania and removed by defendants to the United States District Court for the Eastern District of Pennsylvania. An earlier suit brought by plaintiff in federal court naming defendants only in their official capacities has been suspended by stipulation of the parties pending the outcome of the present action.

and claims that his employment was thereby wrongfully terminated: he seeks reinstatement, back pay and benefits, and attorney's fees and costs.

The defendants moved to dismiss the action as barred by the applicable statute of limitations. They claimed that this was an action against government officials controlled by a six-month residuary provision set forth in 42 Pa. Cons.Stat.Ann. §§ 5522(b)(1),or, alternatively, an action for personal injury governed by the two-year period set forth in 42 Pa.Cons.Stat.Ann. §§ 5524(2). Fitzgerald, on the other hand, characterizes his claim as analogous to wrongful interference with economic relations and breach of an at-will employment contract. He maintains that since none of the specific limitations

periods, including the two-year personal injury provision, applies to his claim, it is governed by the six-year residuary statute of limitations then set forth in 42 Pa.Cons.Stat.Ann. § 5527(6)(current version at 42 Pa. Cons. Stat. Ann. § 5527 (Purdon Supp. 1984)).

The district court agreed with defendants. In dismissing Fitzgerald's action, the court held that his claim was "analogous to the intentional infliction of emotional distress," both because Fitzgerald had "no contractually protected property or economic right" and because "the gravamen of [his] charge is the emotional distress which burdens [his] right to exercise his political rights." The court therefore held that the action was barred by Pennsylvania's two-year

statute of limitations applicable to personal injuries. Fitzgerald appeals, and we reverse.

II

In Burnett v. Grattan, 52 U.S.L.W. 4916(June 27, 1984), Justice Marshall, speaking for the Court, set forth the process that the federal courts must follow in determining the rule of decision to be applied in actions brought under the Reconstruction-era Civil Rights Acts, 42 U.S.C. § 1981 et seq., when the statutes do not contain an applicable rule. He said:

> In the absence of specific guidance, Congress has directed federal courts to follow a three-step process to borrow an appropriate rule. 42 U.S.C. § 1988. First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." Ibid. If no suitable federal rule exists,

> courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum state. Ibid. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States." Ibid.

52 U.S.L.W. at 4918 (footnote omitted). Congress has not prescribed a limitations period for actions brought under §§ 1983, 1985, and 1988. Because it is "now settled that federal courts will turn to state law for statutes of limitations in actions brought under [the Reconstruction-era Civil Rights Acts][2] id. we look to Pennsylvania's law of limitations. The parties place before us three Pennsylvania statutes of limitations:

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[2]Only 42 U.S.C. § 1986 contains a statute of limitations, namely, a one-year provision.

(1) the six-month residuary provision controlling actions against government officials that do not fall within a specific provision. 42 Pa. Cons. Stat. Ann. §5524(2): or (3) a general residuary statute providing for a six-year limitation for actions that do not fall within a specific provision. 42 Pa.Cons. Stat.Ann. § 5522(b)(1): (2) the two-year limitation period for actions "to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another." 42 Pa.Cons.Stat.Ann. § 5527(6)(1978) (amended 1980 and 1982)(current version at 42 Pa.Cons.Stat.Ann. § 5527(Purdon Supp. 1984)).

In Knoll v. Springfield Township School District, 699 F.2d 137 (3d Cir.

1983), cert. granted, 52 U.S.L.W. 3929 (July 2, 1984), we held that the six-month limitation period governing actions against government officials cannot be applied to § 1983 actions because it is too short to serve the remedial purpose of the federal rights statutes. 699 F.2d at 142. See also Perri v. Aytch, 724 F.2d 362, 368 (3d Cir. 1983); Johnson v. Swyka, 699 F.2d 675, 675-76 (3d Cir. 1983) (per curiam), petition for cert. filed. 52 U.S.L.W. 3071 (May 19, 1983).

After Knoll was decided, the Supreme Court held in Burnett that it was inappropriate to borrow the limitations period from an administrative employment discrimination statute for actions against public officers under the Civil Rights Acts. 52 U.S.L.W. at 4920. The Court observed that:

> the legislative choice of a restrictive six-month limitations period [appears to] reflect[] in part a judgment that factors such as minimizing the diversion of State Officials' attention from their duties outweigh the interest in providing employees ready access to a forum to resolve valid claims. That policy is manifestly inconsistent with the central objective of the Reconstruction-era Civil Rights statutes, which is to ensure that individuals whose federal Constitutional or statutory rights are abridged may recover damages or secure injunctive relief.

Id. This court's decision in Knoll similarly emphasized the remedial objective of the Civil Rights Acts. Thus, use of the six-month statute is precluded by this court's decision in Knoll. See IOP Chapter 8[C].[3] Unlike

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[3]Defendants have moved that we hold this appeal pending the Supreme Court's disposition in Knoll. Because the petition for certiorari was granted on July 2, 1984, it is unlikely that a decision from the Supreme Court will be FOOTNOTE CONTINUED ON NEXT PAGE.

those circuits that have selected one of the state's statutes of limitations as applicable uniformly to all § 1983 actions, see, e.g., Garcia v. Wilson, 731 F.2d 640, 651 (10th Cir. 1984)(in banc); Pauk v. Board of Trustees, 654 F.2d 856, 866 (2d Cir. 1981); Beard v. Robinson, 563 F.2d 331, 336-38 (7th Cir. 1977), cert. denied, 438 U.S. 907 (1978); Smith v. Cremins, 308 F.2d 187, 190 (9th Cir. 1962), this court has analyzed the particular claim in suit on an ad hoc basis, focusing on "the

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FOOTNOTE 3 CONTINUED
forthcoming before the Spring of 1985. Plaintiff argues that he would be prejudiced by a delay because of defendants' position that recovery for past wages would be precluded by the Eleventh Amendment. Without ruling on that issue, we have concluded that it would be more expeditious to remand so that the action may proceed in the district court.

relief sought and the type of injury alleged." Aitchison v. Raffiani 708 F.2d 96, 101 (3d Cir. 1983). Accord McGhee v. Ogburn, 707 F.2d 1312, 1313-14 (11th Cir. 1983); Shaw v. McCorkle, 537 F.2d 1289, 1293 (5th Cir. 1976); Cf. McClam v. Barry, 697 F.2d 366 (D.C. Cir. 1983)(Bivens action). The divergent views among the circuits have been fully explored in Garcia v. Wilson, 731 F.2d at 643-48.

Our approach has been to characterize "the essential nature of the federal claim within the scheme created by the various state statutes of limitations." Davis v. United States Steel Supply, 581 F.2d 335, 337 (3d Cir. 1978); see also Knoll, 699 F.2d at 140. Then we look to the "the limitation...which would be applicable in the courts of the state in which the

federal court is sitting had an action seeking similar relief been brought under state law." Myers v. Pennypack Woods Home Ownership Association, 599 F.2d 894, 900 (3d Cir. 1977)(quoting Polite v. Diehl, 507 F.2d 119, 122 (3d Cir. 1974) (in banc)). Thus, for example, we have held that those portions of a plaintiff's § 1983 claim alleging unconstitutional detention and incarceration were governed by Pennsylvania's one-year statute of limitations relating to actions for false arrest; that the portion of his claim alleging physical and other abuse by state policemen as well as the claim for a guilty plea coerced by physical abuse were governed by Pennsylvania's two-year personal injury statute; and that the claim for unlawful seizure of plaintiff's automobile was analogous to

and governed by the state's six-year statute for actions for the recovery of goods. Polite v. Diehl, 507 F.2d at 122-23.

Defendants maintain that Fitzgerald's claim most nearly resembles a personal injury in the nature of intentional infliction of emotional distress. However, in Knoll, which involved a suit by a school teacher who was denied promotions to several administrative positions and claimed employment discrimination on the basis of gender, we observed: "review of the new Pennsylvania limitations scheme... fails to reveal any provision expressly applicable to claims for the torts of wrongful discharge or interference with contractual or economic rights." 699 F.2d at 141. Accordingly, we applied the six-year residuary provision. The district court in this case distin-

guished Fitzgerald's claim from Knoll's by characterizing Fitzgerald's claim as a First Amendment claim for infringement of his freedom of association, an intangible right, and Knoll's claim as one for infringement of a contractually protected property or economic right in his job, a primarily economic right.

We do not accept such a distinction. We conclude, instead, that Fitzgerald's claim, like Knoll's, is for unlawful employment discrimination, and that the rights allegedly infringed are primarily economic ones. Whatever emotional distress Fitzgerald may have experienced as a result of the exercise of his First Amendment rights, it is undisputed that he also suffered tangible economic losses--his job as well as lost wages and benefits--and, indeed, it is these losses that form the basis of his suit.

This is consistent with the approach we have used in other employment discrimination cases, where we stressed the economic nature of the injury for which suit was brought. In Davis v. United States Steel Supply we said: "Essentially, Mrs. Davis complains that [her employer] demeaned her and fired her because of her race. In terms of legal relief, plaintiff's complaint does not seek damages for either property or bodily injury. The complaint seeks back wages and fringe benefits lost as a result of her firing." 581 F.2d at 338. In Skehan v. Board of Trustees, 590 F.2d 470 (3d Cir. 1978), cert. denied, 444 U.S. 832 (1979), the plaintiff claimed his contract had not been renewed by officials of Bloomsburg State College because of the exercise of his First

Amendment rights in regard to his political activities. We held that Skehan's claim "most resembled the state law claim of wrongful interference with a contract, and that it did not seek damages for a bodily injury but rather for economic loss." Id. at 477.

Defendants argue that Davis and Skehan are inapplicable because they were decided under a prior specific limitations provision repealed by the time relevant to this action. We had construed that earlier provision to cover personal injuries of a bodily nature only. Act of June 24, 1895, P.L. 236, § 2, 12 P.S. § 34 (amended 1976)(current version at 42 Pa.Cons.Stat.Ann. § 5524 (Purdon Supp. 1984). See Meyers v. Pennypack Woods Home Ownership Association, 559 F.2d

894, 902 (3d Cir. 1977)(provision limited to bodily injury). It is true, as defendants suggest, that our conclusion in Skehan that the plaintiff's claim did not involve bodily injury focused on the absence of bodily injury. 590 F.2d at 476-77. Nevertheless, our conclusion in Skehan that the claim there, which is virtually indistinguishable from the claim asserted in this case, essentially involved economic injury is still applicable. Indeed, in Knoll we characterized the claim in Skehan as "a claim of employment discrimination" and confirmed that in Skehan "[w]e...analogized [this claim] brought under the federal Civil Rights Acts, to 'those torts which involve the wrongful interference with another's economic rights or interests.'" 699 F.2d at 141

(quoting Skehan, 590 F.2d at 477). Moreover, the plaintiff in Skehan was nontenured, like Fitzgerald. Thus, contrary to the district court's conclusion, it in no way detracts from the essentially economic nature of Fitzgerald's claim that he may have lacked a contractually protected property or economic right.

III.

In accordance with this court's focus on ascertaining the state anolog to the specific facts underlying the claim, we find that Fitzgerald's claim is essentially economic in nature. Consequently, we conclude that a Pennsylvania court would not apply a statute of limitations applicable to personal injuries. Because there is "[no Pennsylvania limitation] provision expressly applicable to claims for the torts of wrongful discharge or interference with contractual or economic rights," Knoll, 699 F.2d at 141 we hold that the appropriate limitations period is that found in 42 Pa.Cons.Stat.Ann. § 5527(6)(current version at 42 Pa.Cons.Stat.Ann. § 5527 (Purdon Supp. 1984)), which provides for a six-year limitation for civil actions not subject to another

specified limitation. Accordingly, Fitzgerald's claim was timely filed.

For the foregoing reasons we will reverse the dismissal of this action and will remand it to the district court for further proceedings.

A TRUE COPY:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FRANCIS W. FITZGERALD,	:	
	:	
Plaintiff	:	
	:	
v.	:	C. A. NO.
	:	82-0762
	:	
THOMAS LARSON, et al.,	:	
	:	
Defendants	:	

REPORT OF MAGISTRATE

Before the court is plaintiff's motion to dismiss the complaint on the basis that the action is barred by the statute of limitations.

This is an action under 42 U.S.C.A. §§ 1983-1983, 1988, in which plaintiff, a former employee of the Pennsylvania Department of Transportation (Penn DOT) holding a non-tenured position, alleges that he was fired solely because of political party affiliation. The named defendants are State Officials who

allegedly wrongfully terminated plaintiff's employment. Plaintiff seeks reinstatement to his former position, back pay and all benefits which have been denied him since his termination, reasonable attorneys' fees and costs, and other appropriate relief.

This action was commenced by the filing of a complaint in the Commonwealth Court of Pennsylvania. Defendants filed preliminary objections in the nature of a demurrer in which they contended that this action was barred by the Pennsylvania 6 month statute of limitations, 42 Pa. CSA § 5522(b)(1). Before that court could rule on the merits of that defense, defendants filed a petition for removal of the action to this court, and subsequently the plaintiff filed a motion to remand to the Commonwealth Court.

One of the arguments advanced by plaintiff in support of the motion to remand was that the Eleventh Amendment bars federal court jurisdiction over claims for monetary relief against state officials acting in their official capacities, and that, therefore, this court lacks jurisdiction to hear the instant case. The court disagreed, noting that while the Eleventh Amendment bars federal jurisdiction over claims for retroactive damages or back pay against state officials acting in their official capacities, the Amendment does not bar a suit seeking prospective declaratory or injunctive relief against the same officials. The court noted that additionally, the Amendment does not bar an action for retroactive damages or back pay against an official sued in his individual capacity, and in

the instant case, plaintiff has sued defendants in their individual and official capacities. The motion to remand was denied for those and other reasons.

Defendants then filed a motion for enlargement of time in which it was noted that while the action was pending before the Commonwealth Court, the defendants had filed a demurrer, asserting that plaintiff's claim was barred by the statute of limitations; that since the court case was now before federal court, this demurrer would be tantamount to a motion to dismiss on the basis of the statute of limitations under Rule 12, Fed.R.Civ.P., and that the parties should have additional time to brief this defense. The court granted the parties additional time, and defendants filed a brief in which they argued that

since it appeared from the face of the complaint that plaintiff was dismissed from his job on June 7, 1979, his cause of action, if any, accrued at that time, and that since the complaint was filed on May 5, 1982, almost 3 years later, the complaint must be dismissed either on the basis of the 6 month Pennsylvania period of limitations contained in 42 Pa. CSA § 5522(b)(.), or in the alternative, it should be dismissed as being barred by the 2 year period of limitations set forth in 42 Pa. CSA § 5524 (Doc. No. 15).

Before the plaintiff could respond, the defendants filed a letter with the court, noting that a recent decision of the Third Circuit in Knoll v. Springfield Township School District, 1982, 699 F. 2d 137, had addressed the applicability of §5522(b)(1) in the context of a claim of sex based

employment discrimination, and that this would have an impact made on the argument presented in defendants' brief. The court granted defendants the right to submit a supplemental brief directed at the impact that Knoll would have on the argument made in defendants' initial brief. Defendants then filed a supplemental brief (Doc. No. 19), plaintiff filed a response (Doc. No. 20), and defendants filed a reply brief. (Doc. No. 21). By order dated June 8, 1983, the court referred this motion to the magistrate for report and recommendation. (Doc. No. 22).

Certain facts are not in dispute. The parties seem to agree that plaintiff was a non-tenured employee and had no contractual right to continued employment. They also appear to agree that the plaintiff's

cause of action accrued on June 7, 1979, when he was fired. Further, defendants no longer contend that this action is barred by the 6 month period of limitation set forth in § 5522(b)(1). Rather, defendants argue that the court should apply the 2 year statute of limitations set forth in § 5524.

In Knoll, the court had before it the question of whether a 6 month period of limitation set forth in § 5522(b)(1), governing suits against state governmental officials, applies to sex based employment discrimination claims brought under 42 U.S.C.A. § 1983. The district court had held that the action was barred by that 6 month limitation. The court in Knoll noted that because Congress has not prescribed a specific statute of limitations for actions brought under § 1983, it was necessary to borrow the

state law of limitations governing an analogous cause of action. The court noted that the selection of the appropriate state limitation provision requires characterization of the essential nature of the federal claim within the scheme created by the various state statutes of limitation. The court noted that since in past cases it had analogized a claim of employment discrimination brought under the federal Civil Rights Act to those torts which involved the wrongful interference with another's economic rights or interests, and since a review of the new Pennsylvania limitations scheme failed to reveal any provision expressly applicable to claims for the torts of wrongful discharge or interference with contractual or economic rights, the court would have to look to two residuary provisions of

the limitation scheme, the 6 month period provided in § 5522(b)(1) and the 6 year period contained in § 5527(6), which control only when the nature of the dispute falls outside one of the more specific limitations provisions.

The court noted that the focus of this inquiry must shift from probing the nature of the cause of action --which is irrelevant once the more specific, non-residuary provisions have been discounted as inapplicable -- to determining which statute of limitations the Pennsylvania courts would have applied had this action been brought under state law. The court noted that because the 6 year limitation only applies if the 6 month limitation does not, and since the action was clearly brought against an officer of any government unit for anything done in the execution of his

office, the 6 month period in § 5522(b)(1) would ordinarily apply. The court held, however, that since such a short 6 month statute of limitations would contravene the remedial purposes of federal civil rights actions and would be inconsistent with the legislative history and subsequent judicial construction of those acts, the 6 month period of limitation would be rejected. Since that left only the residuary 6 year period of limitation, the court applied that period and held that the action was not at the time barred.

With respect to the claims which are primarily for money damages against the defendants in their individual capacities, it appears that the 2 year statute would apply. Unlike the sex based employment discrimination claim in Knoll, the instant case involves a

claim that plaintiff was discharged due to his political affiliation. He had no contractually protected property or economic right, and thus the claim here is most analogous to the intentional infliction of mental distress, such as in cases where personal and intangible rights are implicated. A claim of a political discharge burdens an individual's rights of belief, association and speech. Branti v. Finkel, 1980, 445 U.S. 507, 513-517; Elrod v. Burns, 1976, 427 U.S. 347, 355-359. The gravamen of plaintiff's tort charge is the emotional distress which burdens plaintiff's right to exercise his political rights, a claim which exists independent of the economic consequences that flow therefrom. The decisions in this district have held that a claim of wrongful discharge is most analogous to

intentional infliction of mental distress where personal and intangible rights are implicated. See MacMurray v. Board of Trustees of Bloomsburg State College, M.D. Pa. 1977, 428 F.Supp. 1171, 1178-79; West v. Williamsport Area Community College, M.D. Pa. 1980, 492 F.Supp. 90, 94-98; Mazur v. Department of Revenue, M.D. 1981, 516 F.Supp. 1328, 1332-33.

Further, in Bruffett v. Warner Communications, Inc., 3 Cir. 1982, 692 F.2d 910, an employer terminated the plaintiff's temporary employment after plaintiff was told by his employer that he had not successfully completed a medical examination and requested the plaintiff to undergo further extensive tests which plaintiff refused to do on the basis that he had successfully completed the medical examination. In requesting plaintiff to undergo further

medical examinations, the employer communicated to plaintiff that there was a risk of future serious kidney failure that plaintiff felt was not justified in view of the results of the medical examination which plaintiff did undergo. The court held that the gravamen of plaintiff's intentional tort is the emotional distress resulting from his employer's actions in unjustifiably communicating to him a risk of future serious kidney failure, a claim which accrued when plaintiff was informed that he had not successfully completed the medical examination. Thus, even though economic losses flowed from the termination of his employment, the court applied the 2 year period of limitation contained in § 5524(2) in deciding that that count was barred by

the Pennsylvania statute of limitations.

In the instant case, it appears that the gravamen of the intentional tort is the emotional distress resulting from his employer's communication to him, at least by implication, that he cannot keep his job due to his political preferences.

As noted by the court in Knoll, the residuary periods of limitation do not come into play until the more specific nonresiduary provisions dealing with the nature of the claim have been discounted as inapplicable. Here, based on the nature of the claim, § 5524(2) would be applicable.

With respect to the claim against the defendants in their official capacities, the court has held that the defendants are properly in this case for purposes of future injunctive relief in the event that plaintiff's

claim that he be reinstated to his job was found to be meritorious. A Pennsylvania court asked to grant equitable relief will generally adopt and apply the statute of limitations which governs the analogous action at law. Thus, where a corresponding legal right is barred by the statute of limitations, equitable relief will also be denied. West v. Williamsport Area Community College, supra.

Plaintiff argues that in Knoll, the court proceeded to identify the anomalous effect which would result from application of liberal language of the Pennsylvania limitation statutes. Plaintiff argues that since defendants in a § 1983 action are, by definition, usually some type of government officials, the 6 months limitation period would govern a cause of action brought against them, whereas the same

nongovernment defendants sued under one of the civil rights statutes proscribing certain private actions would be subject to one of the longer limitations periods. Plaintiff argues that the rationale of Knoll is equally applicable to the present case since applying the 6 months limitation period in § 5522(b)(1) to this action would thwart Congessional intent, in that in an action such as the present one wherein the defendants are sued in their official and private capacities, the literal application of the Pennsylvania limitations provisions would result in the application of two different limitations periods to the same cause of action.

Plaintiff's argument misses the point. Defendants no longer contend that the 6 month period of limitations could be applied in this case.

Further, even if § 5522(b)(1) regarding the 6 month period of limitation in an action against any officier of any government unit for anything done in the execution of his office were still viable, that section, by its very terms, does not come into play where the action falls into one of the more specific non-residuary provisions. The Knoll court specifically recognized this. Since the magistrate believes that the claim here presented would fall within the purview of § 5524, that provision would be applicable to each capacity in which the defendants are sued, and to each type of relief, equitable or legal, and there would be no inconsistency. In any event, since the Knoll decision specifically rejected the 6 month residuary period of limitation, even if the claim did not fall within the more specific

periods of limitation dealing with the nature of the action, the only residuary that could now be applied to defendants in both their official and private capacities would be the 6 year period of limitations, and hence there would still be no inconsistency. However, as noted above, the magistrate believes that the type of claim here asserted fits within the more specific period of limitation contained in § 5524.

On the basis of the foregoing, it is respectfully recommended that defendants' motion to dismiss be granted.

Raymond J. Durkin,
United States Magistrate

Dated: July 8, 1983

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FRANCIS W. FITZGERALD, Plaintiff	:	
v.	:	C.A. No. 82-0762C.
THOMAS LARSON, et al., Defendants	:	

O R D E R

Upon independent review of the entire record and the applicable law, IT IS HEREBY ORDERED THAT:

1. The report[1] and recommendation of the Magistrate are adopted.

2. The defendants' motion to dismiss is granted.

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[1]The magistrate's report incorrectly stated that "before the court is plaintiff's motion to dismiss." The report should also be corrected to reflect that the action was brought pursuant to 42 U.S.C.A. §§ 1983-1986, 1988.

3. The clerk of the Court is directed to close the file on this case.

Sylvia H. Rambo
United States District Judge

Dated: September 28, 1983

Supreme Court, U.S.
FILED
DEC 4 1984
ALEXANDER L. STEVAS
CLERK

NO. 84-706

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

THOMAS LARSON, Individually and as Secretary of the Pennsylvania Department of Transportation; JOHN HARHIGH, Individually and as Director of the Bureau of Human Resources; ROBERT ROWLAND, Individually and as Engineer, Engineering District 6-0; SAMUEL ARRIGO, Individually and as Maintenance Manager, Maintenance District 6-1, Bucks County; LOUIS O'BRIEN, Individually and as Director, Bureau of Maintenance; JOSEPH WADE, Individually and as Assistant District Engineer; HONORABLE RICHARD THORNBURGH, Individually and as Governor of the Commonwealth of Pennsylvania,

Petitioners

v.

FRANCIS W. FITZGERALD,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

By: RONALD JAY SMOLOW
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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

a. Does **Burnett v. Grattan**, No. 83-264, 52 U.S.L.W. 4916 (June 27, 1984) preclude application of a state's six-month statute of limitations to actions commenced under the federal Civil Rights Acts?

b. Must all civil actions commenced under the federal Civil Rights Acts be characterized the same for purposes of borrowing a state statute of limitations?

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SUMMARY OF ARGUMENT

This Court's recent decision in **Burnett v. Grattan** precludes the application of a six-month statute of limitations to this federal civil rights action.

Congress and this Court have consistently declined to inject uniformity into the characterization of federal civil rights actions for the purpose of borrowing a state statute of limitations. Each case is unique and must be characterized on its own facts.

ARGUMENT

1. This Court's Recent Decision In **Burnett v. Grattan**, No. 83-264, 52 U.S.L.W. 4916 (June 27, 1984) Compels Rejection Of This Petition For Writ Of Certiorari.

Burnett squarely **held** that Maryland's six-month statute of limitations for filing employment discrimination complaints with the state Human Affairs Commission could not be applied to actions brought pursuant to the Civil Rights Acts. The crux of that holding was this Court's recognition that federal law places a "substantial burden" on a civil rights litigant to prepare, plead and prove his or her case. **Burnett, supra**, 52 U.S.L.W. at 4919. This Court also noted that "The [six-month] time limit . . . does not correspond in any significant way to th[is] substantial burden . . .." **Id.**

Knoll v. Springfield Township School District, 699 F.2d 137 (3rd Cir. 1982), **cert. granted**, No. 83-1889 (July 2, 1984) correctly applied established precedent and anticipated the rationale recognized in **Burnett**. As a matter of law, a six-month statute of limitations cannot be applied to federal civil rights actions. **Burnett** is controlling and compels rejection of this Petition for Writ Of Certiorari.

2. The Granting Of The Writ Of Certiorari In **Garcia v. Wilson**, No. 83-2146, **cert. granted**, (October 1, 1984) Does Not Compel The Granting Of This Petition For Writ Of Certiorari.

In **Garcia v. Wilson**, 731 F.2d 640 (10th Cir. 1984) (**en banc**), the Court of Appeals for the Tenth Circuit concluded "that **every** section 1983 claim is in essence an action for injury to personal rights", and therefore "all section

1983 claims in [the Tenth] circuit will be **uniformly** so characterized for statute of limitations purposes." 731 F.2d at 651. (emphasis added).

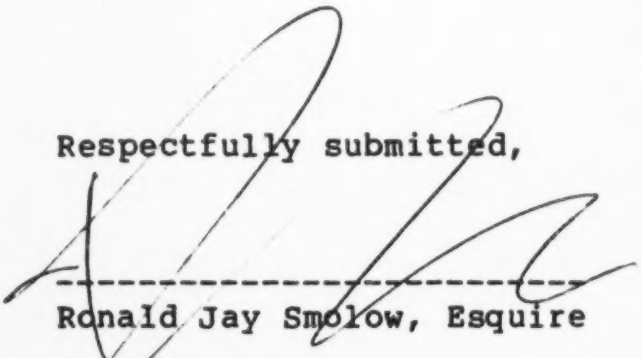
This analysis is expressly contrary to this Court's consistent recognition that Congress has declined to establish a uniform national approach in federal civil rights actions. **Board of Regents v. Tomanio**, 446 U.S. 478, 489 (1980); **Robertson v. Wegmann**, 436 U.S. 584, 593 n.11 (1978); **see Burnett, supra**, 52 U.S.L.W. at 4921 (opinion concurring in judgment only). Surely the refusal to serve a business patron solely on the grounds of race is inherently different from the discharge of an employee solely on the grounds of political affiliation and must be characterized differently for the purpose of borrowing a state statute of limitations. The Tenth

Circuit in **Garcia** has attempted to inject uniformity into federal civil rights actions when Congress and this Court have declined to do so. The granting of the Writ of Certiorari in **Garcia** is no reason to grant a Writ in this case. Rather, established precedent suggests otherwise.

CONCLUSION

Petitioner has failed to present this Court with any reasons sufficient to grant a Writ of Certiorari. Rather, the lower court correctly applied the established precedent of this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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